Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	
	)	CS Docket No. 96-46
Open Video Systems	)	

To the Commission:

REPLY COMMENTS OF
MICHIGAN, ILLINOIS AND TEXAS COMMUNITIES CONSISTING OF:

Michigan: **City of Detroit, City of Grand Rapids, Allendale Township, Alpine Township, Charter Township of Au Sable, Baldwin Township, City of Birmingham, Byron Township, City of Cedar Springs, Village of Chelsea, Village of Clinton, Coldwater Township, Gaines Charter Township, City of Garden City, Georgetown Charter Township, City of Gladwin, Grand Haven Charter Township, Grand Rapids Charter Township, City of Grandville, Holland Township, City of Ishpeming, City of Kalamazoo, City of Kentwood, Lincoln Charter Township, City of Livonia, City of Marquette, Milton Township, City of Muskegon, City of Petoskey, Plainfield Township, City of Reed City, Richmond Township, City of Roseville, City of Southfield, Village of Spring Lake, City of Sturgis, City of Walker, City of West Branch, City of Westland, Whitewater Township, City of Wyoming, Zeeland Township, Michigan Chapter of the National Association of Telecommunications Officers and Advisors**

Illinois: **City of Batavia, Village of Downers Grove, City of Wheaton, Illinois Chapter of the National Association of Telecommunications Officers and Advisors**

Texas: **City of Arlington, City of Edgecliff Village, City of Kennedale, City of Longview, City of Watauga, City of Weatherford**

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SUMMARY

The Michigan, Illinois, and Texas Communities ("MIT Communities") offer their Reply Comments to express support for the previous comments of municipal and independent programmer participants in this rulemaking concerning open video systems. In addition, the MIT Communities are compelled by the importance of this rulemaking to elaborate further on such comments and to address the comments of the cable industry and telephone industry interests.

The Commission must assist the development of independent programmers to increase subscriber choice. In this regard, municipalities, like the Commission, represent and are charged with protecting the public interest. Open access to and nondiscrimination are critical to implementing Congress' concept of OVS. Moreover, local involvement in the certification process of prospective OVS operators is required. Municipalities and local governments are uniquely suited and situated to protect the public by controlling their public rights-of-way. The 1996 Telecommunications Act recognizes this and the Commission should affirm a local role in the OVS certification process. Aside from the numerous legal reasons for such a role, special local needs, concerns, and policies bolster the necessity of local consent prior to invasive open video system construction and operation.

It is also important that the open video system rules not contravene the plain language and intent of the 1996 Telecommunications Act by allowing cable operators to become OVS providers. The stated Congressional goal in creating the open video system option for telephone common carriers is to facilitate competition and new entrants into the video delivery market. Allowing incumbent cable operators to forestall competition by

receiving the reduced regulatory treatment of an OVS provider is simply unacceptable from any perspective.

Finally, the Commission should adopt the "match or negotiate" proposal described in the National League of Cities comments regarding OVS operators providing public/educational/governmental ("PEG") access channels.

Like most communities, the MIT Communities desire and look forward to the benefits of increased competition in the video marketplace. But, the fruits of competition will be spoiled by inattention to and avoidance of particularly local needs. This Commission's open video system rules must correctly implement Congress' goals of competition, and preservation of local control and compensation when public rights-of-way are utilized.

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To the Commission:

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MICHIGAN, ILLINOIS AND TEXAS COMMUNITIES

I. INTRODUCTION

A. MIT Communities and Their Interest In This Matter:

Michigan, Illinois and Texas communities ("MIT Communities") are composed of the following:

From Michigan 42 communities,[1] plus the Michigan Chapter of the National Association of Telecommunications Officers and Advisors ("Michigan NATOA"). From

[1] City of Detroit, City of Grand Rapids, Allendale Township, Alpine Township, Charter Township of Au Sable, Baldwin Township, City of Birmingham, Byron Township, City of Cedar Springs, Village of Chelsea, Village of Clinton, Coldwater Township, Gaines Charter Township, City of Garden City, Georgetown Charter Township, City of Gladwin, Grand Haven Charter Township, Grand Rapids Charter Township, City of Grandville, Holland Township, City of Ishpeming, City of Kalamazoo, City of Kentwood, Lincoln Charter Township, City of Livonia, City of Marquette, Milton Township, City of Muskegon, City of Petoskey, Plainfield Township, City of Reed City, Richmond Township, City of Roseville, City of Southfield, Village of Spring Lake, City of Sturgis, City of Walker, City of West Branch, City of Westland, Whitewater Township, City of Wyoming, and Zeeland Township

Illinois three municipalities[2] and the Illinois Chapter of NATOA, and from Texas six cities.[3]

Each of the municipalities is the franchising authority for cable television service in its area and has had a franchise[4] with its cable television operator for some time. Collectively the municipalities in the three states have approximately two million residents.

The two state chapters of NATOA inform and participate in legislative judicial, regulatory and technical developments that impact local government in their states on cable and telecommunications matters. Their membership includes municipal officials actively involved in and responsible for cable and telecommunications matters throughout the States of Michigan and Illinois.

All the municipalities and the NATOA Chapters are vitally concerned about this Commission's development of open video system ("OVS") regulations and submit these Reply Comments to forward the public interest in that regard.

B. Missing Commentators: One of the most notable features of the comments received by the Commission to date in this rulemaking is the near absence of any comments by independent programmers (that is, programmers unaffiliated with any cable or

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[2] City of Batavia, Village of Downers Grove, and City of Wheaton

[3] City of Arlington, City of Edgecliff Village, City of Kennedale, City of Longview, City of Watauga, and City of Weatherford

[4] Communities sometimes use different terms for the permission given cable companies and others to use the local rights of way and to transact a local business. The term "franchise" is used in these Reply Comments in the same manner as it is used in Section 602 (9) of the Communications Act (47 U.S.C. §522(9)), namely meaning the initial or renewal authorization to construction and operate a cable system (or telephone system, as the case may be) even though its title may vary.

telecommunications provider) and the similar near absence of any comments by subscribers. The only comments submitted by independent programmers were those of the Alliance for Community Media et. al. and Access 2000, and the only subscriber commentator was the Consumer Federation of America. Yet as the Notice of Proposed Rulemaking in the above-captioned proceeding (released March 11, 1996)("NOPR") and many of the comments emphasized, access to and actual use of open video systems by large numbers of independent programmers is essential for OVS to succeed. Such success is ultimately measured by subscriber satisfaction, rates and choice.

Given the importance of independent programmers, this Commission must give great weight to the comments of the Alliance for Community Media and Access 2000, as these are the only comments from the independent programming industry showing what they need for OVS to succeed as Congress envisioned.

C. Independent Programming as Infant Industry: The lack of comments by independent programmers, particularly when compared with the large number of comments filed by telephone companies, cable operators and their affiliates, shows the current weak state of the independent programming industry. It indicates, in effect, that independent programming is an "infant industry" much like cable television was decades ago. For similar reasons, this infant industry must have the OVS rules, presumptions and burdens of proof written substantially in its favor to grow and become a healthy competitive force that can fulfill the role Congress intended for it and for OVS.

The Commission should use this "infant industry" approach in all aspects of its OVS rulemaking and should reject the suggestions made by Bell Atlantic and others which

effectively ignore (or affirmatively reject) this premise, such as by leaving substantial amounts of discretion with the OVS provider. History shows that such discretion is often abused to prevent third parties (such as the independent programmers) from using telephone company lines to reach subscribers.

D. Importance of Municipal Comments: The lack of comments by independent programmers and subscribers reinforces the importance of the various municipal comments in this rulemaking as proxies for these entities and for the public interest. The cable operators, telephone companies and others similarly situated represent private interests. Cities and other local units of government represent the public interest -- and have had substantial first-hand experience at the local level with cable television for decades.

For these reasons, the MIT Communities respectfully suggest that the positions of the municipal commentators in this proceeding take on added importance and should be subject to great deference. In particular, where the viewpoints of the various commenting parties differ, the comments of local units of government should be viewed as a sound indication of where the true public interest lies.

E. General Position of MIT Communities: The MIT Communities strongly support the joint comments of the National League of Cities, the United States Conference of Mayors, the National Association of Counties, the National Association of Telecommunication Officers and Advisors, and several cities ("NLC Comments") and the proposals therein to implement the OVS regulatory framework. The NLC Comments discuss the critical principles this Commission must incorporate in its open video system rules. These principles include: (1) ensuring community needs and interests are met under

the PEG and other Title VI requirements Congress established for OVS; (2) preventing discrimination by OVS operators against non-affiliated programmers; (3) increasing competition and new entrants by prohibiting cable operators and other non-telephone companies from becoming OVS operators; and (4) preserving local control and management of the public rights-of-way and reasonable compensation for the use thereof.

II. NON-DISCRIMINATORY ACCESS TO CHANNELS

A. Public Disclosure of Contracts: There is substantial agreement among the commentators (other than the telephone companies) that the rates charged programmers, the contracts with the programmers, or both, must be public. See e.g., NCTA Comments, at 19-20; Alliance for Community Media Comments, at 16 and following; National League of Cities Comments, at 15 and following.

The MIT Communities agree. The entire contract (or contracts, as the case may be) between an OVS provider and any entity providing programming on the system must be public. Requiring that all such contracts be public will help fulfill the Commission's statutory obligation to "ensure" (emphasis supplied) that the rates, terms and conditions for carriage are just and reasonable; by itself will tend to prevent "discrimination by OVS providers" (which is prohibited by the Act); and will tend to disclose any such discrimination which has occurred so that redress can be sought promptly. See Communications Act § 653(b).

Arguments to the contrary by the telephone companies on this point are incorrect. Public disclosure will clearly aid in achieving the statutory purposes just quoted and there are no legitimate business reason under the circumstances for such contracts to be kept secret.

Put more simply, secret contracts are not compatible with the concept of an open video system easily accessible to all programming providers.

B. True Independence: There is a history of telephone companies concealing or hiding their affiliations with supposedly "independent" programmers. See, for example, the instances cited by Tele-Communications, Inc. ("TCI") in its comments at page 8. MIT Communities therefore support the comments of the National League of Cities and others that independent programmers must be truly "independent" to be counted towards the two-thirds requirement of the Act. The Commission's former rule which barred "any financial or business relationship whatsoever by contract or otherwise, directly or indirectly between the carrier and the customer, except only the carrier-user relationship" must be applicable here, including the explanatory note accompanying that section.[5]

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[5] The former rule, 47 C.F.R. § 63.54, provided in relevant part as follows:

> "(a) No telephone common carrier subject in whole or in part to the Communications Act of 1934 shall engage in the provision of video programming to the viewing public in its telephone service area, either directly, or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the telephone common carrier. . . .
>
> "(c) As used above, the terms 'control' and 'affiliate' bar any financial or business relationship whatsoever by contract or otherwise, directly or indirectly between the carrier and the customer, except only the carrier-user relationship.

C. Procedures: The procedures by which independent programmers can obtain access to an OVS are as important as the rates that are charged. Access delayed can be access denied in a very real sense. For example, an independent programmer attempting to launch a channel simultaneously on multiple cable systems can be easily thwarted if access to the system(s) in question can be "strung out" by the kind of regulatory delays which have occurred in the regulated telecommunications environment. Thus, regulatory procedures delayed for years the ability of customers to supply that mundane item, the telephone, that everyone uses -- and now can purchase freely. New competitors in the telephone industry have experienced analogous delays on interconnection, co-location, access charges, number portability and other issues. See Leslie Canley, Rivals Are Hung Up On Baby Bells' Control Over Local Markets, *Wall Street Journal*, (October 24, 1995, at 1 attached as Exhibit A). Similar claims have been made against the cable companies for their use of the regulatory process to delay video dial tone.

These examples indicate how the procedures for independent programmers to obtain access to OVS systems must be quick and easy for programmers to use.

The proposal made by the Alliance for Community Media at page 24 (and following) of their initial comments, provides the best means to satisfy the preceding goals with its

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"NOTE: Examples of situations in which a carrier and its customer will be deemed to be controlled or having a relationship include the following among others: Where one is the debtor or creditor of the other (except with respect to charges for communication services); where they have a common officer, director, or other employee at the management level; where there is any element of ownership or other financial interest by one in the other; and where any party has a financial interest in both."

combination of a filing with this Commission, State PUCs and franchise authorities of a preliminary notice of intention to apply for an OVS permit and the filing of affiliate contracts or tariffs for system use by independent providers.

D. Rate Discrimination: Large amounts of programming from independent providers is essential for OVS to succeed. As is noted above, such independent programming is in many respects an "infant industry."

Combining the preceding concepts with the Congressional thrust toward lessened regulation mandates the MIT Communities' support of the following points made by the National League of Cities, Alliance for Community Media and others on OVS access rates, terms and conditions:

-- Rates must be a part of a rate structure and not negotiated on a case by case basis.

-- Rate differences can only be based on easy, objective, verifiable criteria such as volume discounts, special rates for non-profit programmers or the like. Any other approach will not satisfy the statutory mandate of rates that are "non-discriminatory," "just and reasonable" and minimize regulation.

-- All rate structures and individual contracts must contain a broad, most favored nations clause. Such a clause is important because it will automatically (without any action by this Commission) give the affected programmer an individual contractual right to the best terms that are legitimately available -- providing a "check and balance" against illegal discrimination by making the OVS operator liable for damages should it

violate the prohibition against discrimination or unjust and unreasonable rates.

This last point is particularly important by removing some of the incentive for an OVS provider on a challenge to its rates to engage in "regulatory delay" in hopes that (a) the cost and duration of the complaint process before this Commission will effectively prevent an independent programmer from pursuing its claim, and (b) at worst, it will simply cost the operator the attorneys fees involved in a proceeding at this Commission while it gets to discriminate in the meantime.

OVS providers must accept the "quid" of exposure to damage claims for improper actions as the "quo" for relaxed regulation. This will move towards allowing market type forces to operate while preventing the abuses that can occur if OVS operators can simply use this Commission's procedures as a shield against damage claims to which they would otherwise be exposed.

E. Digital Allocation Problems: MIT Communities respond to the comments of the National League of Cities on the allocation of capacity between analog and digital channels (see National League of Cities comments at 14) as follows:

The Commission has to tailor its regulations to recognize three key points which made digital transmission unavailable to many, if not most, cable subscribers for the foreseeable future and which in some respects may make digital channels a less desirable mode of transmitting video signals.

1. Home Wiring: Most existing home cable wiring simply will not work with digitally compressed signals. Wiring defects (such as a crimp or nick or damage

from rodents or the house shifting) will only slightly degrade a standard 6 MHz NTSC signal but simply will not work with a digital signal.[6]

The cable television companies and telephone companies have confirmed the preceding point repeatedly to several MIT Communities and have stated affirmatively that most homes will have to be rewired in order to receive digital signals. MIT Communities have specifically inquired on this point because it is important that they and their residents know that the burden and expense of all new home wiring will have to occur before the promise of digital signals being receivable in the home can be realized.

The cable and phone company engineers have also indicated that it is not a situation where the current home wiring will simply degrade digital signals and make them appear a little fuzzy -- instead, for technical reasons, problems with home wiring that make a conventional analog signal a little weaker or fuzzy, with digital signals make the screen go blank.

2. Converters Needed: Second, as the Commission is well aware, special digital converter boxes will be required before the digital signals can be received and used in the home. It will be several years before such digital converter boxes appear, at least in significant numbers, and converter boxes will be very expensive -- probably

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[6] For example, John Egan, President and CEO of Antec Corp said, "It's a horror story out there" about the poor quality of in-home cable wiring and its potential harmful impact on digital compressed signals. "Telco Faces Uphill Treck on Cable Entry", *Multichannel News*, May 9, 1994, p. 1; see also "In-home Wiring Problems May Stall Digital", *Multichannel News*, April 19, 1993, p. 4B ("the inside of cabled homes may well prove to the bane of digital signals"); "Trouble in the House: Wiring Could Trip Digital Signals", *Multichannel News*, January 9, 1995, p. 31.

between $500 and $1,000 (roughly the cost of a DBS satellite dish). This will significantly deter consumers from using digital signals, especially if they have to buy such boxes. In this regard, several MIT Communities which have negotiated new or renewed franchises with fiber rebuilds have been generally rebuffed in their attempts to get a firm commitment as to when digitally compressed signals will be available, in part due to the lack of converters (and lack of any firm date as to when they will be available), as well as due to the home wiring problem set forth above.

3. Fuzzy Signal: Third, digital signals will not be, in many cases, of as good quality as analog signals. Again, the cable and telephone companies have told communities that although digitizing signals allows compression, compression (providing 2, 4 or 6 signals over the 6 MHz channel currently used for one analog signal) leads to progressively greater deterioration and degradation of signal quality. Thus digital signals may lead to 500 channels, but they are likely to be 500 fuzzy channels.

4. Rules Needed: For the preceding reasons, the Commission has to treat any digital portion of bandwidth on channels offered by an OVS provider totally separately from the analog portion. Otherwise the Commission runs the great risk that programmers can be forced onto the digital portion of OVS spectrum against their will and thus be consigned to a multi-channel oblivion where few, if any, subscribers will be able to receive their signal. This would be an obvious subversion of the "open" intent of OVS systems.

Therefore, MIT Communities strongly support the position set forth by the National League of Cities and others that the two-thirds channel allocation has to be computed separately for analog and digital.

In addition, to ensure that independent programmers can actually reach the subscribers and not be discriminated against, no entity should be forced by the OVS operator to be placed on a digital channel against their will. Indeed, the Commission should create a presumption that all independent programmers requesting a channel allocation from an OVS operator shall be on an analog channel.

F. Channel Increments: MIT Communities support the point made by several commentators that channels should be available in small increments. The Commission's new commercial leased access rules provide for channels to be made available in increments as short as 30 minutes. 47 C.F.R. § 76.971(g). In the public access area, time slots of relatively short duration have made available to programmers for years. Last year, this Commission questioned why telephone companies cannot make channels available to "part-time users." 10 FCC Rcd. 4104, 4118 (1995). The National Cable Television Association supports making channels available in relatively short increments. Comments and Petition for Reconsideration of National Cable Television Association, at 14-15.

MIT Communities therefore respectfully suggest that channel space be made available to programmers in increments as short as 15 minutes. This will ensure that both programmers who operate on a part-time basis have access to the OVS as well as those who are able to operate on a full-time basis.

G. Rates: Rates are a key factor (along with terms, conditions and procedures) to ensuring the success of OVS by attracting large numbers of independent programmers. For this reason and because of the "infant" nature of the independent programming industry the Commission must resolve all doubts in favor of OVS rates that are as low as possible.

In this regard, MIT Communities support (and will not repeat at length) proposals already made in this docket by the Alliance for Community Media and others that:

1. Require that any OVS operator be a separate, stand-alone entity from its affiliated entities in order to help ensure that improper rates can be detected if that becomes necessary.

2. As suggested by NCTA, the Commission promptly take appropriate steps to ensure that the costs of an OVS system are appropriately allocated between telephone (or other non-OVS) functions and OVS to prevent cross-subsidization of OVS by telephone subscribers (or others).

3. There be a presumption (rebuttable by only clear and convincing evidence) that an access rate more than 10% higher than the incremental cost of providing service is unreasonable, and

4. There be an "outcomes based" presumption (again rebuttable only by clear and convincing evidence) that unless 25% of the system capacity is occupied by non-affiliated programmers that the OVS provider's rates are presumptively unreasonable.

This combination of approaches helps the Commission achieve (a) the statutorily defined purposes of preventing discrimination, unjust or unreasonable rates, while (b) minimizing telephone company-type regulation and (c) preserving the necessary financial records to examine rates in detail should that become necessary.

III. THE 1996 TELECOMMUNICATIONS ACT PROHIBITS NON-LECS FROM BEING OVS OPERATORS

The plain language and intent of Section 653(a)(1) of the 1996 Telecommunications Act prohibits cable operators and other non-LECS from becoming OVS operators. Accordingly, the MIT Communities strongly support the comments of the National League of Cities, and the State of New Jersey Board of Public Utilities' Office of Cable Television ("New Jersey BPU") especially on this point. The comments provided by the cable operator interests fail to cite any persuasive statutory language, legislative history, or policy reasons which squarely supports the conclusion that cable operators should be allowed to operate an OVS. Indeed, the cable industry comments did not list any significant benefits the public actually would receive after permitting cable operators and others to become OVS operators.

This section briefly reviews the statutory language and intent which prevents cable operators from becoming OVS operators, and supports the conclusions reached in the comments of the New Jersey BPU. The conclusions refute the only benefit cable operators attempt to raise in this regard (i.e., increased competition). If cable operators could provide open video systems, then competition actually would be lessened, if not eliminated, in the service area.

A. Statutory Provisions: The NOPR asks whether the distinction in Section 653 between a local exchange carrier who "may provide cable service" through an open video system, and cable operators and others who "may provide video programming" through an open video system, is significant. NOPR, at ¶ 64. The comments of the cable industry fail to minimize this crucial distinction. In fact, the comments of Cox Cablevision and Adelphia Cablevision et. al., concede that these terms are defined differently under the Act. Cox Comments, at 2; Adelphia Comments, at 4. The Commission must respect and implement the different meanings Congress attached to these terms.

Section 602(7) of the 1996 Act defines "cable system" and clearly states, "such term does not include . . . an open video system that complies with Section 653 [of Title IV]." Communications Act § 602(7). Moreover, in Section 651(a)(4) Congress continually references a "common carrier" or "carrier" in operating as an open video system, no reference is made to a "cable operator" or "operator." Communications Act § 651(a)(4). Part V itself is titled, "Video Programming Services Provided by Telephone Companies" which shows Congressional intent to limit OVS operators to telephone companies and to exclude cable operators.

The legislative history further bolsters the position that cable operators cannot provide OVS services. In pertinent part, the Conference Report to the 1996 Cable Act states as follows:

> "First, the conferees hope that this [OVS] approach will encourage common carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets. Second, the conferees recognize that common carriers that deploy open systems will be 'new' entrants in established markets and deserve lighter regulatory burdens to level the playing

field. . . ." Conf. Rep. No. 104-458, 104th Cong. 2d. Sess., 178 (January 31, 1996) [emphasis added].

Congress specifically intended that common carriers (i.e., local exchange carriers), not cable operators, should offer OVS services in established markets to "introduce vigorous competition." Id.

The language, intent, and reasoning of the 1996 Act in introducing the OVS option to local exchange carriers would be subverted if cable operators could become OVS operators. The "significant benefits" of competition between cable operators and OVS providers would be eliminated.

The cable operator comments futilely attempt to argue that by allowing cable operators to become OVS providers competition will flourish. As the comments of the New Jersey BPU conclude, the result would be lessened competition. New Jersey Comments at 4-6. Thus, no "significant benefits" accrue to the public. Instead, cable operators would receive significant benefits from strengthening a monopoly position and avoiding competition from new entrants. Such a result would be contrary to the principal thrust of the 1996 Telecommunications Act which is to benefit subscribers by increasing the number of providers. Allowing telephone companies to become OVS providers in competition with the local cable incumbent squarely meets this goal. This goal is not met -- and is actually subverted -- if cable operators are allowed to become OVS operators in their service territory and thus claim that they are not subject to customer service standards, technical standards, rate regulation or local franchise obligations.

B. Local Obligations: If the Commission were to contravene the language of the 1996 Act and Congressional intent and allow cable operators to become OVS providers, then cable operators would claim they are not subject to their franchise obligations. As the National League of Cities points out, such a result is constitutionally suspect.

Moreover, cable operators will contend such a result would remove the critical local considerations of universal service; public, educational, and governmental access; nondiscrimination; and compensation for use of the rights-of-way, among others. Congress certainly did not intend this result, and any benefits would be outweighed by such dramatic costs and risks.

Public interest considerations certainly militate against allowing cable operators and other persons to become open video system operators. The Commission should carefully examine these public interest factors before it facilely contravenes statutory plain language and intent and public policy needs.

IV. THE OVS CERTIFICATION PROCESS MUST REQUIRE RECEIPT OF LOCAL APPROVAL

A. Local Consents Required before Certification: The MIT Communities support the proposal of National League of Cities that prior to certification, the prospective OVS operator must obtain all necessary local consents to use the rights-of-way. National League of Cities Comments, at 52. This requirement ensures that public needs, interests, safety concerns, welfare, and access are protected. The 1996 Act does not prohibit this Commission from adopting such a requirement. In fact, the comments of The Texas Cities, The National League of Cities, et. al., and the named Political Subdivisions of the State of Minnesota, point out that the legislative history of Section 653 reflects an express intention

to preserve local management over the rights-of-way and compensation therefor. See also Conf. Rep. No. 104-458, 104th Cong. 2d Sess., 178 (January 31, 1996).

Major public policies underlie the need for a role of state and local governments in both cable television and OVS. Congress recognized these policies in the 1984 Cable Act and the 1996 Telecommunications Act. This section describes typical major issues that state and local governments are uniquely situated to address and which must be incorporated in the Commission's certification requirements for OVS operators. These policies simply cannot be handled effectively at the federal level.

MIT Communities also respectfully note that although the 1996 Act precludes OVS providers from Title VI franchises, nothing in the Act precludes a franchising authority or other local government from requiring a franchise, permit, license, consent, or agreement for an OVS provider to use public rights of way. And in fact, the Conference Report affirmatively includes such a requirement. Id.

B. Right-of-Way Issues: This is a critical issue for MIT Communities which the various telephone company comments ignore. To rectify this error, this section and the following sections describe some of the issues and problems associated with use of the rights-of-way; the need for appropriate compensation for private use; the impact of serious congestion of poles and underground conduits; the disruption that the massive construction in the public right-of-way for open video service will cause; and issues regarding the legal authority of telephone companies to use the rights-of-way for open video service. In each instance, local approval is the key to satisfactory resolution of the right-of-way issues.

C. Right-of-Way Summary: Local governments must retain control in the public interest over the use of the highways and public rights-of-way. Such control is essential to protect the public and ensure safe and efficient use of this scarce resource for several reasons.

First, in some areas, localities must address the issue of congestion or scarcity.

Second, local governments deal with the significant problems created by new construction in the rights-of-way. As an example, this may include mandating joint use of certain poles and trenches to minimize disruption and assure that space on overhead poles or underground conduits is most efficiently used.

Third, cities frequently deal with not only physical placement and local code requirements for construction, but also specify significant requirements for insurance, bonds, letters of credit, and the like. Collectively, these provisions tend to help ensure that construction is done safely and properly and if not, that there are responsible parties present to pay damages.

Work in the rights-of-way can lead to accidents and major claims. This is illustrated by a situation in Maryland where a cable company hit a gas main, causing an explosion that damaged 88 homes (Rod Granger, "Cable Dig Explosion Damages 88 Homes," *Multichannel News*, January 30, 1995, p. 12, attached in Exhibit B) and by the explosion a TCI subcontractor caused (Joe Estrella, "TCI Subcontractor Blamed for Colorado Explosion," *Multichannel News*, March 20, 1995, p. 10 and "Gas Leak Blows Up 2 Homes, Damages 10," *The Denver Post*, March 14, 1995, p. 1, attached in Exhibit C). Risks such as these make it necessary to have substantial insurance requirements in franchises so that

the service provider, municipality, and residents are all protected with adequate types and amounts of coverage[7] and ensuring that the insurance carrier is a responsible party (such as by requiring a specified rating from a company that rates the financial strength of insurers). Franchises also typically require indemnities from the utility or cable company to the municipality so that the municipality and its residents are not unnecessarily exposed to liability. Such indemnities and insurance are critical for municipalities to ensure that its general fund and ability to provide vital local services (police, fire, streets) are not affected by major claims created by cable or telephone company constructions and accidents in the rights of way.

D. Congestion of the Public Rights-of-Way.

1. Introduction: In many municipalities there is extreme congestion on utility poles and in underground conduits. Space for additional communications lines is limited, and in some cases nonexistent, or very expensive to add. These are matters of unique local concern which the telephone company comments ignored and which can only be addressed at the local level, such as through the pre-certification process.

2. Discussion: The space on existing utility poles or underground conduits for additional utility infrastructure is extremely limited in many MIT Communities. This is especially true in the larger central cities, such as Detroit, Grand Rapids, and in older portions of other cities where the utility infrastructure must accommodate

[7] For example, unless so specified, most insurance policies do not cover underground construction, which is particularly prone to causing claims.